to a jury beyond a reasonable doubt in order to obtain an extended sentence. It prevents, for example, a state from setting up a system whereby "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene." *Id.* at 306. *Blakely* requires a state to prove to a jury "the facts of the crime the state *actually* seeks to punish." *Id.* at 307 (emphasis in original). Unless the state proves to a jury all of the "facts of the crime," it cannot use any of those facts to "authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.* at 305 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).[7]

Here, we do not have a situation where elements of the crime were changed to "sentencing factors." *Id.* at 306. The change in mode of service – from stayed to executed – of the presumptive 42-month sentence was not based on "facts of the crime," but rather on facts about the offender. *Blakely* simply does not address or apply to use of offender-related facts for dispositional departures.

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[7] *See also Apprendi v. New Jersey*, 530 U.S. 466, 478, 496 (2000) (describing the facts that need to be proved to a jury as "all the facts and circumstances which constitute" the offense and contrasting those with recidivism, which "does not relate to the commission of the offense"); *Harris v. United States*, 536 U.S. 545, 557 (2002) (explaining that the Constitution prevents the legislature from manipulating the definition of a crime, for example by labeling certain types of facts "sentencing factors" and thereby relieving the government of its obligation "to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt"); *Booker*, 543 U.S. at 230 (noting that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of *all of the elements of the crime* with which he is charged") (emphasis added).

Along with the *Blakely* decision itself, the history of dispositional departures and the Sixth Amendment also supports the conclusion that *Blakely* does not apply to dispositional departures, as Chief Judge Toussaint persuasively explained in the Minnesota Court of Appeals' decision in *State v. Hanf*, 687 N.W.2d 659, 664-666 (Minn. Ct. App. Oct. 19, 2004), *rev'd* (Minn. Dec. 13, 2005); App. 22-36. That decision is worth quoting at length:

> The traditional role of the jury has never extended to determining which offenders go to prison and which do not. Traditionally, courts and parole officials made "their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation." *Mistretta v. United States*, 488 U.S. 361, 363 (1989). . . .
>
> We note also that dispositional departures were unknown when the Sixth Amendment was ratified. In 1916, the United States Supreme Court held that the federal district court lacked the authority to suspend a criminal sentence indefinitely upon conditions of good behavior. *Ex Parte United States*, 242 U.S. 27, 27 (1916). The Court noted that under the common law, temporary reprieves and executive pardons were the only means of escaping the criminal judgment. *Id.* at 43-44. Even as early as 1860, one court expressed the opinion that the court "does not possess the power to suspend sentence indefinitely in any case." *Id.* at 46 (quoting *People v. Morisette*, 20 How. Pr. 118 (1860)). Thus, when the Bill of Rights was ratified, the jury's verdict authorized only execution of the prescribed sentence.

> This tradition establishes that an offender's amenability or unamenability to probation is not a "fact," within the meaning of *Apprendi*, that increases the offender's penalty. . . . [A]n offender's unamenability to probation is a judgment reached after consideration of a series of facts. It is not a "fact necessary to constitute the crime," *Apprendi*, 530 U.S. at 500, but rather a strictly offender-related conclusion.
>
> . . . We conclude that the determination of amenability or unamenability to probation is not the determinate, structured fact-finding that *Blakely* holds the jury must perform.
>
> The Supreme Court has made a similar distinction with respect to the offender's criminal history, or recidivism, which it has termed "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998). The Court stated that, "to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition" in which recidivism went to the punishment only. *Id.* at 244. The same could be said with even greater force concerning the offender characteristics that govern dispositional departures, which extend beyond the offender's criminal history score. To hold that the Sixth Amendment requires those personal characteristics to be found by a jury would be an even further departure from tradition than to treat recidivism as an "element." We do not believe that *Blakely* requires this result.

Id. at 664-66 (parallel citations omitted); App. 32-35.

Further, an offense/offender distinction is consistent with the plain language of the United States Constitution. Specifically, Section 2 of Article III states: "The trial of all crimes, except in cases of impeachment, shall be by jury;" and the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." As Professor Douglas Berman has convincingly explained:

> The Constitution frames the jury trial right in terms of "crimes," which are the basis for a "prosecution" of "the accused." This language connotes that the jury trial right attaches to all offense conduct for which the state seeks to impose criminal punishment, but the language also connotes that the jury trial right does not attach to any offender characteristics which the state may deem relevant to criminal punishment. . . .
>
> The jury trial right should be understood to concern offense conduct and not offender characteristics because the state defines "crimes" and accuses and prosecutes based on what persons do and not based on who they are. When the law ties punishment consequences to specific conduct – such as the amount of money or drugs involved in the offense . . . – the state has defined what specific conduct it believes merits criminal sanction. The jury trial right in turn guarantees that a defendant can demand that a jury determine whether the defendant in fact did that specific conduct the state seeks to punish.
>
> However, once offense conduct has been properly established – either through a jury trial or a defendant's admission – a judge may properly consider whether and to what extent offender characteristics may justify more or less

> punishment in response to that conduct. When the law ties punishment consequences to aspects of a person's past and character . . . the state is not defining what conduct it believes merits criminal sanction, but rather is instructing judges how to view and assess an offender at sentencing. A state should be able to structure through statutes or guidelines precisely how a judge considers offender characteristics without implicating the jury trial right.
>
> . . . [An] offense/offender distinction, in addition to being suggested by the text of the Constitution, resonates with and is buttressed by the distinctive institutional competencies of juries and judges, and the distinctive judicial ambit of trials and sentencings. Trials are about establishing the specific offense conduct that the state believes merits criminal punishment; sentencing is about assessing both the offense and the offender to impose a just and effective punishment. Juries can reasonably be expected to determine all offense conduct at a (pre-sentencing) trial, and the state can reasonably be required to prove to a jury at a trial all the specific offense conduct for which the state seeks to impose punishment. But judges are better positioned to consider (potentially prejudicial) offender characteristics at a (post-trial) sentencing, and the state should be permitted to proffer information concerning an offender's life and circumstances directly to a judge to assist punishment determinations.

Douglas A. Berman, *Conceptualizing Blakely*, 17 Fed. Sent. R. 89, 2004 WL 314893 *1-2 (Vera Inst. Just.) (footnotes omitted); *see also* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277 (October 2005).

Finally, to anticipate an argument from respondent that the offense/offender distinction is not a clear one, the test for whether a fact is offender-related, and therefore not subject to *Blakely*, could be as simple as this: if the crime had been committed in exactly the same way but by a different offender, would the fact at issue still be relevant? If the answer is yes, then the fact is offense-related and subject to *Blakely*. If the answer is no, because the fact solely relates to the offender and not to the way the crime was committed, then the fact is offender-related and not subject to *Blakely*.

The Minnesota Supreme Court's decision improperly and significantly expands *Blakely*, in conflict with the decisions of appellate courts of several other states. Certiorari is warranted to definitively resolve this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 21, 2006

Respectfully submitted,

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706 N.W.2d40

Supreme Court of Minnesota.
STATE of Minnesota, Respondent,
v.
James A. **Allen**, Appellant.
No. A04-127.

Nov. 23, 2005.

OPINION

John M. Stuart, State Public Defender, Benjamin J. Butler, Assistant State Public Defender, Office of the State Public Defender, Minneapolis, MN, for Appellant.

Mike Hatch, Attorney General, Thomas R. Ragatz, Assistant Attorney General, St. Paul, MN, Alan L. Mitchell, St. Louis County Attorney, Jeff Vlatkovich, Assistant County Attorney, Duluth, MN, for Respondent.

Heard, considered, and decided by the court en banc.

PAGE, Justice.

In *State v. Shattuck*, 704 N.W.2d 131 (Minn.2005), we held that the imposition of an upward durational departure from the presumptive sentence prescribed by the Minnesota Sentencing Guidelines, based solely on facts found by the judge, violates the Sixth Amendment right to trial by jury under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In this case, we are asked to decide whether an upward dispositional departure executing the presumptive stayed sentence under the guidelines, based on judicially found facts without the aid of a jury, is also unconstitutional under *Blakely*. We are further asked to decide whether the Sixth Amendment jury-trial guarantee prohibits the district

court from assigning a custody-status point in determining the defendant's criminal history score under the guidelines. We answer the first question in the affirmative and the second one in the negative. We therefore reverse the decision of the court of appeals and remand to the district court for resentencing.

On July 19, 2003, Cindy Campbell telephoned the Hibbing police to report that James Allen had shown up at a residence where Campbell was visiting, and that she had fled into the bedroom. Campbell had previously reported having problems with Allen. When the responding officer, Captain Gielen, arrived, he saw a grey Ford Bronco in the driveway. Captain Gielen knew that Allen drove such a vehicle and that Allen's driver's license had been cancelled. The residence was that of Allen's mother, who let Captain Gielen in. Allen was sitting in the kitchen. He told the officer he had not done anything, and that he had driven over to take a shower without knowing that Campbell was there. Captain Gielen detected a strong odor of alcohol on Allen's breath and noticed that his eyes were watery and bloodshot and that he was acting agitated.

When Captain Gielen and another officer escorted Allen outside, Allen's brother drove up and asked if he could take Allen with him. Captain Gielen said no. Allen then asked if he could lock up his vehicle, and taking keys from his pocket, locked the doors of the Bronco. The officers then placed him under arrest.

At the police station, Allen was given the implied-consent advisory and refused to provide a breath test. The reason he gave for refusing was that he had just been sitting at his mother's kitchen table. Allen repeatedly said he had not been driving and that his brother had given

him a ride to his mother's house. Allen's brother later informed Captain Gielen that he had last seen Allen several hours before he drove over to his mother's house to pick Allen up.

Allen was charged with first-degree test refusal and first-degree driving while under the influence of alcohol, both felonies. Minn.Stat. §§ 169A.20, subds. 1(1), 2; 169A.24 (2004).[1] He was also charged with the gross misdemeanor offense of driving after cancellation of his license. Minn.Stat. § 171.24, subd. 5 (2004). Allen entered a negotiated plea of guilty to first-degree test refusal in exchange for dismissal of the other charges. The plea agreement left the sentence up to the district court.

The district court determined that Allen had a custody-status point because he was on probation when he committed the current offense. *See* Minn. Sent. Guidelines II.B.2.a. As a result, Allen's presumptive sentence was 42 months, stayed. *See* Minn. Sent. Guidelines IV. Based on Allen's numerous prior alcohol-related convictions and his history of absconding from probation, the court found that Allen was not amenable to probation and sentenced him to an executed 42-month prison term, an upward dispositional departure from the presumptive stayed sentence.

Allen appealed, arguing that the district court abused its discretion in imposing the dispositional departure. While the appeal was pending, the United States Supreme Court issued its decision in *Blakely*. The court of appeals

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[1] Both offenses are forms of first-degree driving while impaired, a severity level seven offense under the Sentencing Guidelines. Minn.Stat. § 169A.24; Minn. Sent. Guidelines IV, V. All references to the Sentencing Guidelines in this opinion are to the 2004 version.

affirmed, concluding that ample evidence supported the district court's finding of unamenability to probation. *State v. Allen*, No. A04-127, 2004 WL 1925881 at (Minn.App. Aug.31, 2004). The court declined to address the implications of *Blakely*, noting that the issue had not been briefed and stating that "*Blakely* does not appear applicable" to a dispositional departure based on unamenability to probation. *Id.* at n.1.

I.

The state argues that Allen forfeited consideration of his *Blakely* claim on appeal by failing to raise an *Apprendi* objection in the district court, and that the claim is not reviewable under the plain-error doctrine. Ordinarily, we will not decide issues that are raised for the first time on appeal, even constitutional questions of criminal procedure. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn.1989). We have the discretion to consider an unobjected-to error if it is a plain error or defect affecting substantial rights. Minn. R.Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn.1998). At our discretion, we may also address such issues when the interests of justice require their consideration and doing so would not work an unfair surprise on a party. *Sorenson*, 441 N.W.2d at 457; *see* Minn. R.Crim. P. 28.02, subd. 11; 29.04, subd. 11.

There are recognized circumstances in which the defendant's failure to raise a sentencing issue at the time sentence is imposed does not waive consideration of the issue on later review. *See* Minn.Stat. § 590.01, subd. 1 (2004) (providing for postconviction sentencing remedy); Minn. R.Crim. P. 27.03, subd. 9 (allowing district court to correct unlawful sentence at any time); *State v. Fields*, 416

N.W.2d 734, 736 (Minn.1987) (allowing challenge to durational sentencing departure following revocation of stayed sentence); *State v. White,* 300 Minn. 99, 105-06, 219 N.W.2d 89, 93 (1974) (holding that statutory prohibition against double punishment for offenses committed in single behavioral incident cannot be waived).[2] In other circumstances, we have held that by failing to object at sentencing, the defendant forfeited the right to consideration of a sentencing issue on appeal. *State v. Lopez-Solis,* 589 N.W.2d 290, 293 n. 3 (Minn.1999) (reasonableness of prosecution costs); *Blondheim v. State,* 573 N.W.2d 368, 368-69 (Minn.1998) (mandatory minimum fine); *see also State v. Leja,* 684 N.W.2d 442, 447 n. 2 (plurality opinion), 457 n. 3 (Blatz, C.J., dissenting) (2004) (together holding that failure to raise *Apprendi/Blakely* challenge to sentence on appeal waived issue).

In this case, we choose to address Allen's claim in the interests of justice. We do so because of the importance of determining *Blakely's* applicability to upward dispositional departures and the assignment of a custody-status point, issues that affect numerous cases statewide. We also note that the *Blakely* decision was issued after briefing had been completed in the court of appeals, and Allen immediately notified that court of the decision. For Allen to have objected on *Apprendi* grounds at sentencing would have been of little avail; before *Blakely* was decided, our understanding of *Apprendi* was that the "statutory maximum" penalty authorized by the jury's verdict was the maximum sentence allowed by the statute defining the

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[2] We recently ruled that *Blakely* does not apply retroactively to cases on collateral review. *State v. Houston,* 702 N.W.2d 268, 273 (Minn.2005).

offense. *Shattuck* 704 N.W.2d at 136-37; *State v. Houston*, 702 N.W.2d 268, 271 (Minn 2005); *see Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

II.

We turn, then, to the question whether the district court could constitutionally impose an upward dispositional departure, that is, execute Allen's presumptive stayed sentence, based on its determination that Allen is unamenable to probation. Allen argues that unamenability to probation is a "fact" for *Apprendi* purposes, and that changing sentence disposition from probation to prison constitutes the kind of increase in punishment contemplated by *Apprendi* and its progeny as unconstitutional unless based on facts found by a jury or admitted by the defendant. The state contends that *Blakely* does not apply to dispositional departures under the Sentencing Guidelines. The state argues that: (1) the constitutional rule is concerned with the length of sentence, and a dispositional departure merely alters its mode of service; and (2) the rule requires the state to prove facts relating to the offense sought to be punished, not facts relating to the offender. The state also relies on *State v. Hanf*, in which the court of appeals held that dispositonal departures based on offender-related characteristics do not violate *Blakely* because they are similar to traditional sentencing judgments made by judges in indeterminate-sentencing schemes, which under *Blakely* do not infringe on the province of the jury. 687 N.W.2d 659, 664 (Minn.App.2004) (citing *Blakely*, 542 U.S. at 309, 124 S.Ct. 2531), *rev. granted* (Minn. Dec. 14, 2004).

We first address the argument that *Blakely* does not apply to dispositional departures. Whether the constitutional rule is limited in application to increases in sentence duration, as the state contends, turns on whether an upward dispositional departure "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348.

Minnesota Statutes §609.135, subdivision 1(a) (2004), authorizes the court, with certain exceptions not relevant here, to stay imposition or execution of a sentence. This provision was enacted as part of the Criminal Code of 1963, long before the creation of the Sentencing Guidelines. Act of May 17, 1963, ch. 753, art. I, § 609.135, 1963 Minn. Laws 1185, 1195.

The presumptive sentences set out in the Sentencing Guidelines Grid are presumptive with respect to both duration "and whether imposition or execution of the felony sentence should be stayed." Minn. Sent. Guidelines II.C. For cases below and to the left of a bold line on the grid, the sentence is presumptively stayed unless the conviction carries a mandatory minimum sentence. Minn. Sent. Guidelines II.C, IV. Section II.D. of the guidelines states that the sentencing judge "shall utilize the presumptive sentence" unless the case involves substantial and compelling circumstances. We held in *Shattuck* that under Minnesota's guidelines scheme, "imposition of the presumptive sentence is mandatory absent additional findings." *Shattuck,* 704 N.W.2d at 141. Thus, under this scheme, a judge's discretion to stay or execute a sentence is far more constrained than under an indeterminate-sentencing scheme. Even under an indeterminate scheme, the judge's discretion in imposing sentence is bound by the range of punishment-authorized-by the legislature.

Apprendi, 530 U.S. at 481, 120 S.Ct. 2348. Under Minnesota's determinate sentencing guidelines scheme, the judge must impose a presumptively stayed sentence unless substantial and compelling circumstances are present. Minn. Sent. Guidelines II.D.

In *Blakely,* the Court held that for *Apprendi* purposes the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely,* 542 U.S. at 303, 124 S.Ct. 2531 (emphasis omitted). Thus, the constitutional rule that has emerged from the *Apprendi* line of cases is that "[a]ny fact (other than a prior conviction) which is necessary to support *a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict* must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 756, 160 L.Ed.2d 621 (2005) (emphasis added). In the present case, the maximum sentence authorized by Allen's plea of guilty was a 42-month prison term, with execution stayed. *Shattuck,* 704 N.W.2d at 140-41; Minn. Sent. Guidelines IV. Based on the structure of the Sentencing Guidelines, sentence disposition – here, a stay – is as much an element of the presumptive sentence as sentence duration.

We cannot agree with the argument that a stayed sentence is merely an alternative mode of serving a prison sentence and therefore is not subject to *Blakely.* A defendant whose felony sentence is stayed is subject to supervision for a period of years, and to incarceration in a local facility for no more than one year. Minn.Stat. § 609.135, subds. 1, 2(a), 4 (2004). By contrast, a defendant whose sentence is executed is incarcerated in a state correctional

facility for not less than two-thirds of the sentence duration – in this case, nearly 2-1/2 years – with the remainder on supervised release. Minn.Stat. §§ 244.01, subd. 8; 244.05, subd. 1b(a); 244.101, subd. 1 (2004). The additional loss of liberty that results from execution of a presumptively stayed sentence, it is plain, exceeds the maximum sentence authorized by a plea of guilty or jury verdict, and violates the constitutional rule.

This conclusion finds support in Supreme Court case law as well. In *Ring v. Arizona,* the Court held that the Sixth Amendment jury-trial right encompasses both the fact-finding necessary to durationally increase a sentence and the fact-finding necessary to impose the death penalty. 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). While there is "no doubt that '[d]eath is different,'" *id.* at 605-06, 122 S.Ct. 2428 (citation omitted), imposition of the death penalty rather than life imprisonment and execution of a presumptively stayed sentence have a common thread: both constitute additional punishment that is not authorized by the facts established by the guilty plea or verdict. Moreover, the Supreme Court in *Apprendi* specifically endorsed a statement of the constitutional rule that it is for the jury to make "the assessment of facts that increase *the prescribed range of penalties* to which a criminal defendant is exposed." *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348 (quoting *Jones v. United States,* 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (Stevens, J., concurring)) (emphasis added).

Upward dispositional departures under the guidelines may be based on either offender- or offense-related aggravating factors. *State v. Chaklos,* 528 N.W.2d 225, 228 (Minn.1995). Recognizing that the list of aggravating and mitigating factors in Minn. Sent. Guidelines II.D.2 is

nonexclusive, we have held that when departing dispositionally, the district court can focus more on the defendant as an individual and whether the presumptive sentence would be best for the defendant and for society. *State v. Heywood,* 338 N.W.2d 243, 244 (Minn.1983); *State v. Wright,* 310 N.W.2d 461, 462 (Minn.1981). Thus, a defendant's particular unamenability to probation may be used to justify an upward dispositional departure. *State v. Park,* 305 N.W.2d 775, 776 (Minn.1981); *see also Chaklos,* 528 N.W.2d at 228.

We do not believe that the use of an offender-related factor to depart from the presumptive sentence, or its similarity to factors considered under Minnesota's former indeterminate-sentencing scheme, insulates the departure from the constitutional rule first enunciated in *Apprendi.* The rule applies to "*[a]ny fact* (other than a prior conviction) which is necessary to support a sentence exceeding the maximum." *Booker,* 125 S.Ct. at 756 (emphasis added); *see Blakely,* 542 U.S. at 301, 124 S.Ct. 2531 (quoting *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348); *Ring,* 536 U.S. at 589, 122 S.Ct. 2428 (holding that capital defendants "are entitled to jury determination of any fact on which the legislature conditions an increase in maximum punishment"); *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. Although each of these cases involved enhanced sentences based on offense-related factors, the Court did not limit the rule to those factors.[3] Additionally, with specific reference

[3] We note that in *Apprendi* and one subsequent case, the Court has enunciated the principle that it is permissible for a judge "to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute." *Apprendi,* 530 U.S. at 481, 120 S.Ct. 2348

(Continued on following page)

to the nature of an aggravated sentencing factor, the Court has stressed that "the relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348 (footnote omitted). We conclude, therefore, that the nature of the factor the district court uses to depart from the presumptive sentence is not determinative of whether the constitutional rule applies.

We hold that when the district court found that Allen was unamenable to probation, and on that basis executed his presumptively stayed sentence, it violated Allen's Sixth Amendment right to have a jury make that determination using a reasonable-doubt standard. We further hold that because Minn. Sent. Guidelines II.D authorizes the district court to make such an unconstitutional upward dispositional departure upon finding an aggravating factor without the aid of a jury, that provision is unconstitutional as applied.

We therefore reverse the imposition of the upward dispositional sentencing departure and remand to the district court for resentencing in accordance with this opinion.

III.

Allen also claims that the assignment of a custody-status point in calculating his criminal history score violates *Blakely.* Allen argues that the determination that

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(emphasis in original); *accord Harris v. United States,* 536 U.S. 545, 549, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

he was on probation when he committed the current offense does not come within the prior-conviction exception to the constitutional rule.

A defendant's criminal history score is one of the axes on the Sentencing Guidelines Grid that determines the presumptive sentence. Minn. Sent. Guidelines II.B, IV. It is comprised of the defendant's prior convictions, applicable juvenile record, and custody status at the time of the current offense. Minn. Sent. Guidelines II.B. A custody-status point is assigned if the defendant was on probation or another specified form of release when he or she committed the current offense. Minn. Sent. Guidelines II.B.2.[4]

The primary reason for excluding a prior conviction from the constitutional rule is that the prior conviction

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[4] The guideline reads in pertinent part: 2. One point is assigned if the offender:

> a. was on probation, parole, supervised release, conditional release, or confined in a jail, workhouse, or prison pending sentencing, following a guilty plea or verdict in a felony, gross misdemeanor or an extended jurisdiction juvenile case, or following a felony, gross misdemeanor or an extended jurisdiction juvenile conviction;
>
> b. was released pending sentencing at the time the felony was committed for which he or she is being sentenced;
>
> c. committed the current offense within the period of the initial length of stay pronounced by the sentencing judge for a prior felony, gross misdemeanor or an extended jurisdiction juvenile conviction. This policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence; or
>
> d. became subject to one of the criminal justice supervision statuses listed in 2.a above at any point in time during which the offense occurred when multiple offenses are an element of the conviction offense or the conviction offense is an aggravated offense. Minn. Sent. Guidelines II.B.2.

itself has been established by procedures that satisfy constitutional jury-trial and reasonable-doubt guarantees. *See Apprendi,* 530 U.S. at 488, 120 S.Ct. 2348; *Jones,* 526 U.S. at 249, 119 S.C. 1215. The relevant fact here – Allen's probation status – flowed directly from the sentence for his prior conviction. We believe that the fact a defendant is on probation at the time of the current offense arises from, and is so essentially analogous to, the fact of a prior conviction, that constitutional considerations do not require it to be determined by a jury. *See People v. George,* 18 Cal.Rptr.3d 651, 656 (Cal.App. 4th Dist.2004), *remanded on other grounds,* 34 Cal.Rptr.3d 193, 119 P.3d 959 (Cal.2005); *State v. Brooks,* 690 N.W.2d 160, 163 (Minn.App.2004), *rev. granted* (Minn. Mar. 15, 2005).

In *Shattuck,* we held that for felonies other than first degree-murder, the presumptive sentence prescribed by the Sentencing Guidelines is the maximum a judge may impose based solely on facts reflected in the jury verdict or admitted by the defendant. *Shattuck,* 704 N.W.2d at 141 (citing *Blakely,* 542 U.S. at 303, 124 S.Ct. 2531). A defendant's criminal history score, including custody-status points, is essential to determining what the "statutory maximum" penalty is for *Apprendi-Blakely* purposes. Like the fact or character of a prior conviction, a defendant's custody status can be determined by reviewing court records relating to that conviction. *See Shepard v. United States,* ___U.S.___, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005) (holding that in determining character of prior conviction, court is generally limited to examining certain court documents and statutory offense definition); *State v. Leake,* 699 N.W.2d 312, 325 (Minn.2005) (same). We also note that in the district court, Allen did not challenge the

fact he was on probation when he committed the current offense.[5]

For these reasons, we hold that the district court's assigning Allen a custody-status point to calculate his criminal history score did not violate the Sixth Amendment.

IV.

Finally, Allen requests that we vacate the district court's order requiring him to make a $200 copayment for public defender services. The order was issued pursuant to Minn.Stat. § 611.17, subd. 1(c) (2004), which we subsequently declared unconstitutional in *State v. Tennin,* 674 N.W.2d 403, 410 (Minn.2004).

Allen did not raise this issue in the court of appeals or present it in his petition for review, which would ordinarily bar him from raising it now. We nevertheless address the issue in the interests of justice and vacate the order.

Reversed and remanded.

ANDERSON, G. BARRY, Justice (concurring in part and dissenting in part).

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[5] At sentencing, Allen's counsel stated that the custody-status point was assigned because Allen was "still technically on probation," but argued that this was not significant because, if Allen's earlier sentence had been executed as he requested, the point would not have been assigned. We note that Minn.Stat. § 609.135, subd. 7 (2004), prohibits an offender from demanding execution of a stayed sentence if he or she will serve less than nine months at the state institution," which apparently was the case here.

I concur with the majority that the imposition of an upward dispositional departure under the Minnesota Sentencing Guidelines, based upon a finding of unamenability to probation, violated appellant's Sixth Amendment right to a jury trial. I also concur with the majority that the district court did not violate the Sixth Amendment by assigning appellant a custody-status point in determining appellant's presumptive sentence.

I part company from the majority as to the remedy, for the reasons expressed in the dissent in *State v. Shattuck*, 704 N.W.2d 131, 148 (Minn.2005) (Anderson, G. Barry, J., concurring in part and dissenting in part).

Having concluded the guidelines are nonseverable, the entire sentencing guidelines regime is unconstitutional and I would instead remand for sentencing under the statutory range for the offense committed.[6]

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[6] Under the statute, Allen could receive a sentence of imprisonment for not more than seven years, a fine not exceeding $14,000, or both. Minn.Stat. §§ 169A.20, subd. 2; 169A.24 (2004).

2004 WL 1925881 (Minn.App.)

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
STATE of Minnesota, Respondent,
v.
James A. **ALLEN**, Appellant.
No. A04-127.

Aug. 31, 2004.
Review Granted Nov. 16, 2004.

St. Louis County District Court, File No. K3-03-300904.

Mike Hatch, Attorney General, St. Paul, MN; and Alan Mitchell, St. Louis County Attorney, Duluth, MN, for respondent.

John M. Stuart, State Public Defender, Richard Schmitz, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by RANDALL, Presiding Judge; WILLIS, Judge; and MINGE, Judge.

UNPUBLISHED OPINION

MINGE, Judge.

Appellant challenges his sentence imposed for first-degree test refusal, arguing that the district court abused its discretion in sentencing him to prison, an upward dispositional departure. Appellant argues that he is amenable to probation and that the district court erred in

relying on out-of-state warrants that have not been pursued and prior probation violations. We affirm.

FACTS

Following an incident on July 19, 2003, appellant was charged with one count of test refusal in the first degree, in violation of Minn.Stat. § 169A.20, subd. 2 (2002); one count of felony driving while impaired, in violation of Minn.Stat. § 169A.20, subd. 1(1) (2002); and one count of gross misdemeanor driving after cancellation, in violation of Minn.Stat. § 171.24, subd. 5 (2002). On September 26, 2003, appellant pleaded guilty to test refusal in the first degree and the other charges were dismissed. Appellant had one custody-status point and, under the sentencing guidelines, his presumptive sentence was 42 months with execution stayed. At an October 24, 2003, sentencing hearing, the district court found that appellant was not amenable to probation and, following the recommendations of both the prosecutor and the presentence-investigation report (PSI), departed dispositionally by ordering appellant to a 42-month executed sentence. Appellant appeals his sentence.

DECISION

A district court has broad discretion in sentencing criminal defendants. *State v. Law*, 620 N.W.2d 562, 564 (Minn.App.2000), *review denied* (Minn. Dec. 20, 2000). But a district court "has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn.1999); *see* Minn. Sent. Guidelines cmt. II.D.01. "When a district court departs [from the sentencing

guidelines], it must articulate substantial and compelling reasons justifying the departure." *State v. Schmit*, 601 N.W.2d 896, 898 (Minn.1999). A defendant's amenability to probation and dangerousness to the community are proper factors to consider in determining whether to depart dispositionally. *State v. Carpenter*, 459 N.W.2d 121, 128 (Minn.1990).

Appellant argues that the court departed dispositionally based on improper factors. At sentencing, the district court judge stated:

> I agree with probation that I have to consider the warrants. It does indicate a history of absconding from probation, thirteen prior alcohol related offenses, even if some of them I ought to ignore, there is still more than enough. It speaks of obvious problems with alcohol abuse and Mr. Allen, you just haven't cared to do anything about it at this point in time; that shouts out pretty loudly to the court that you are not amenable to probation. So, I am going to go along with the recommendations for those reasons.

Appellant argues that the district court's ordering of an executed sentence is based on three inappropriate considerations: (1) the court's subjective assessment that appellant was not amenable to probation; (2) the existence of warrants from foreign jurisdictions; and (3) appellant's custody status.[1]

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[1] Pursuant to Minn. R. Civ.App. P. 128.05, appellant sent a letter dated June 30, 2004, advising the court of the United States Supreme Court's decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). But the *Blakely* case addresses aggravating factors related to the offense and used to support *durational* departures.

(Continued on following page)

First, citing to *State v. Christopherson*, 500 N.W.2d 794, 797 (Minn.App.1993), appellant argues that a district court may not depart dispositionally based on its subjective assessment that a defendant is not amenable to probation. In *Christopherson*, we reversed a defendant's sentence when the district court's determination that the defendant was not amenable to probation was contrary to the recommendations of the psychologist and the probation officer, and was unsupported by any evidence in the record. *Id.* But, the facts of the instant case are distinguishable.

Here, the PSI notes appellant's history of both refusing to participate in probation supervision and failing to comply with conditions of probation. The PSI also notes that appellant was not honest about his drinking or previous offenses, minimized his chemical dependency issues, did not take responsibility for his actions by blaming others, and posed an "extremely high risk to public safety." The PSI concluded that appellant was not amenable to probation. We conclude that the record amply supports the district court's determination and that the court did not make its own subjective assessment of appellant's amenability to probation as asserted by appellant.

Second, appellant argues that the district court improperly considered outstanding out-of-state warrants

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Id. at 2536-37. The instant case before us, however, involves a *dispositional* departure based on amenability to probation. This is a judicial sentencing factor that is not based on considerations that could be submitted to a jury. Because appellant has not briefed this issue and because the consideration is amenability to probation, *Blakely* does not appear applicable, and we do not further address its implications.

in justifying a dispositional departure because there is little information in the record regarding these warrants and because the warrants date back almost 10 years. Appellant does not cite to any authority to support his argument. Here, even though the district court stated that it had to consider the warrants, there exists a lengthy criminal, alcohol-related history in appellant's record without consideration of the out-of-state warrants. There is nothing in the record to suggest that these warrants were the sole basis for the district court's dispositional departure and there is ample evidence remaining in the record to support the departure. Accordingly, we conclude the district court did not abuse its discretion in this regard.

Finally, appellant argues that the district court improperly considered his custody status in departing dispositionally. Appellant notes that custody status is already taken into account under the sentencing guidelines in determining appellant's presumptive sentence. *See* Minn. Sent. Guidelines II.B. Here, appellant received one custody-status point for violating his probation. But, the record reflects that the district court considered appellant's custody status in its departure only to the extent that the PSI speaks of appellant's history of absconding from supervision and failing to comply with the terms of previous probations. This history strongly supports the district court's conclusion that appellant is not amenable to probation, a factor that may justify such a dispositional departure, and we conclude that the district court did not improperly consider appellant's custody status in deciding to depart dispositionally.

Because there is ample evidence in the record to support the finding that appellant was not amenable to

probation, we conclude that the district court did not abuse its discretion.

Affirmed.

687 N.W.2d 659

Court of Appeals of Minnesota.
STATE of Minnesota, Respondent,
v.
Arthur Thomas HANF, Appellant.
No. A04-1058.

Oct. 19, 2004.
Review Granted Dec. 14, 2004.
Review Reversed Dec. 13, 2005.

John M. Stuart, State Public Defender, Susan Andrews, Assistant State Public Defender, Minneapolis, MN, for appellant.

Mike Hatch, Attorney General, James B. Early, Assistant Attorney General, St. Paul, MN, and Raymond F. Schmitz, Olmsted County Attorney, Rochester, MN, for respondent.

Considered and decided by TOUSSAINT, Chief Judge; LANSING, Judge; and SHUMAKER, Judge.

OPINION

TOUSSAINT, Chief Judge.

This appeal is from a sentence for felony test refusal. Appellant argues that the upward dispositional departure, which was based on judicial findings, violates his Sixth Amendment right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We affirm.

FACTS

Appellant Arthur Hanf pleaded guilty to felony refusal to submit to chemical testing. Because Hanf had a zero criminal history score, the presumptive sentence for his offense was 36 months with execution stayed. *See* Minn. Sent. Guidelines IV, V. The district court, however, departed dispositionally, concluding that Hanf, due to his numerous failures in chemical-dependency treatment, his three prior driving while intoxicated convictions (DWIs) within ten years, and his posing a threat to public safety, was a "poor candidate" for probation.

Hanf filed this appeal, arguing that his upward dispositional departure was imposed in violation of *Blakely v. Washington.*

ISSUES

1. Does *Blakely v. Washington* apply to the Minnesota Sentencing Guidelines?

2. Does *Blakely* apply to upward dispositional departures?

ANALYSIS

I.

Hanf argues that the dispositional departure, based on the district court's findings, violates the Supreme Court's holding in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In reviewing a constitutional challenge to a statute, this court applies a de novo standard of review. *State v. Wright,* 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999).

In 1978 the Minnesota Legislature created the Minnesota Sentencing Guidelines Commission to promulgate sentencing guidelines for the district courts. Minn.Stat. § 244.09, subd. 5 (1978). The guidelines were to be promulgated on or before January 1, 1980, and were to be "advisory to the district court." *Id.* They were to provide for a presumptive sentence and to allow for upward or downward departures of up to 15 percent from the presumptive sentence. *See id.*, subd. 5(2).

In *Blakely,* the Supreme Court held that the "statutory maximum" is the greatest sentence a judge can impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely,* 124 S.Ct. at 2537 (emphasis omitted). The defendant, it held, has a Sixth Amendment right to a jury determination of any fact, except the fact of a prior conviction, that increases the sentence above this maximum. *Id.* at at 2536, 2543. The Court, therefore, reversed the 90-month "exceptional sentence" that had been imposed under the State of Washington's determinate-sentencing scheme and "remanded for further proceedings not inconsistent with this opinion." *Id.* at at 2535, 2543. In a dissenting opinion, Supreme Court Justice Sandra Day O'Connor stated that the *Blakely* majority opinion "casts constitutional doubt" over all state guidelines systems, including Minnesota's. *Id.* at 2549.

The Minnesota Sentencing Guidelines are similar in operation to the guidelines in Washington that were at issue in *Blakely.* Although the Minnesota guidelines are administrative rather than statutory, they were developed under legislative mandate and are in some sense binding on the district courts. *See* Minn.Stat. § 244.09, subd. 5 (2002) (providing that the guidelines are advisory but the

sentencing court "shall follow" the guidelines procedures when pronouncing sentence in a felony case); *see generally State v. Bellanger,* 304 N.W.2d 282, 283 (Minn.1981) (holding that disagreement with the guidelines does not justify departure); *State v. Hopkins,* 486 N.W.2d 809, 812 (Minn.App.1992) (holding guidelines are not subject to manipulation to justify sentence the court has independently determined).

The Washington guidelines, like Minnesota's, rely on a sentencing "grid" in which presumptive sentences are determined using two variables: offense severity and offender's criminal history (called "offender score" in Washington). Wash. Rev.Code Ann. § 9.94A.510 (2003). Thus, both Washington and Minnesota determine the presumptive sentence by relying, in part, on the offender's criminal history, which is not a fact found by the jury. The 49 to 53 month presumptive sentence range that *Blakely* treated as the "maximum sentence" supported by the jury verdict was not based on the jury verdict alone, but required also non-jury fact-finding on the defendant's criminal history. *See Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000) (holding fact of prior conviction may be determined by a judge).

Because Washington's guidelines also rely partly on criminal history, that factor in Minnesota's sentencing guidelines is not a basis for distinguishing *Blakely.*

In Minnesota, if the sentencing court finds an aggravating factor, it is not *required* to depart from the presumptive sentence. *See State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981) (holding that under the guidelines the judge "may" depart if aggravating factors are present); *State v. Oberg,* 627 N.W.2d 721, 724 (Minn.App.2001)

(noting that even if mitigating factors are present, court is not required to depart), *review denied* (Minn. Aug. 22, 2001).

If the presence of an aggravating factor does not *mandate* a departure, then the sentencing court's finding that an aggravating factor exists has no binding effect on the sentence. It is not like an element of the offense that, if found, requires conviction. It is true that the court, if it decides to depart, must give reasons for the departure. *State v. Geller,* 665 N.W.2d 514, 517 (Minn.2003). But this requirement of departure reasons does not obligate the court to depart whenever aggravating reasons are present.

The judicial fact-finding involved in durational departures under the guidelines, however, differs from the more subjective impressions on which judges would decide a sentence under an indeterminate-sentencing scheme. In *Blakely,* the majority opinion acknowledged that indeterminate-sentencing schemes "involve judicial factfinding, in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion." 124 S.Ct. at 2540. But this fact-finding is acceptable because "the facts [found] do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Id.* (emphasis in original).

Thus, *Blakely* posits a defendant's right to be sentenced to the presumptive guidelines sentence because that is authorized solely by the jury's verdict. In an indeterminate-sentencing scheme, a defendant would have a right only to be sentenced to a term not greater than the statutory maximum, because the jury's verdict would

allow the court to sentence anywhere within that broad range. The "right" recognized in *Blakely* to the presumptive sentence duration exists because the jury must determine "the facts essential to lawful imposition of the penalty," *id.*, and the jury has found no facts beyond the elements of the offense, which determine the presumptive sentence.

Washington's guidelines are similar to Minnesota's in that a departure is not mandatory even if the court finds aggravating factors. *See* Wash. Rev.Code Ann. § 9.94A.535 (2003) (providing court "may" impose "exceptional sentence" if aggravating factors found); see *also State v. Mail,* 65 Wash.App. 295, 828 P.2d 70, 72 (1992) (describing departure as an "option" if aggravating factors present). Thus, this aspect of Minnesota's guidelines is also not a ground for distinguishing *Blakely.*

There is federal caselaw declining to apply *Blakely* to the federal guidelines based on *Blakely's* footnote stating that the federal guidelines "are not before us, and we express no opinion on them," 124 S.Ct. at 2538 n. 9, or on the courts' reluctance to overturn established precedent. *See United States v. Pineiro,* 377 F.3d 464, 465-66, 469 (5th Cir.) (holding that *Blakely* does not *extend to the federal guidelines*). *United States v. Penaranda,* 375 F.3d 238, 239-40, 245 (2nd Cir.2004) (certifying *Blakely* questions to Supreme Court without holding it applies to federal guidelines). But these cases do not identify any significant distinction between the federal guidelines and the Washington guidelines at issue in *Blakely,* and they do not suggest any rationale for avoiding *Blakely's* application to the Minnesota sentencing guidelines. Therefore, although we do not decide that issue, there appears to be no easy way to distinguish *Blakely* based on unique factors in the

Minnesota sentencing guidelines, and we must address the narrower issue of the application of *Blakely* to Minnesota dispositional departures.

The Minnesota Sentencing Guidelines specify sentences that are presumptive with respect to both disposition and duration. Minn. Sent. Guidelines cmt. II.C.01. "Departures with respect to disposition and duration . . . are logically separate decisions." *Id.*, cmt. II.D.02. The guidelines provide a non-exclusive list of permissible reasons for departure, without specifying whether these reasons will support dispositional or durational departures, or both. *Id.*, II.D.2. But caselaw has developed an essentially separate category of reasons for dispositional departures. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn.1982) (holding that a defendant's particular amenability to probation or treatment will justify dispositional departure). Those reasons relate to the individual characteristics of the offender, and may not be used to support a *durational* departure, although some offense-related factors may be used to support dispositional departures. *See State v. Chaklos*, 528 N.W.2d 225, 228 (Minn.1995).

Thus, in practice, dispositional departures in Minnesota have not been governed by the mitigating and aggravating factors listed in the guidelines. In fact, the grounds for dispositional departures have strayed so far from those listed factors that dispositional departures came to be based, although only in part and indirectly, on the social and economic factors that the guidelines *prohibit* as grounds for departure. *See State v. King*, 337 N.W.2d 674, 675-76 (Minn.1983) (holding that social and financial factors may "bear indirectly" on whether defendant is particularly amenable to probation). In 1990, the Guidelines Commission added language in the commentary to

attempt to control this use of prohibited factors. Minn. Sent. Guidelines Cmt. II.D.101. But it has not opposed the predominant use of offender-characteristics to make dispositional decisions.

In interpreting the Minnesota guidelines, our supreme court never attempted to limit dispositional departures to the largely offense-related departure factors listed in the guidelines. *See Garcia,* 302 N.W.2d at 647 (affirming, dispositional departure because defendant was an "extremely poor candidate" for probation). In the pre-guidelines indeterminate sentencing scheme, parole release decisions had come to be governed by a matrix system in which a risk of failure level was assigned to each inmate. *State ex rel. Taylor v. Schoen,* 273 N.W.2d 612, 614-15 (Minn.1978). This level was determined based on identified factors disclosed in "back-ground information." *Id.* at 615 n. 9. At the time, sentencing judges were also acquiring back-ground information on defendants in the presentence investigation. Minn.Stat. § 609.115, subd. 1 (1978).

The supreme court in Garcia and other early cases determined, in effect, that, because the guidelines departure factors were non-exclusive, sentencing courts could continue to use the same offender characteristics they had used before in determining whether the defendant should go to prison. *See Trog,* 323 N.W.2d at 31 (holding that "[n]umerous factors," including age, prior record, remorse, attitude in court, are relevant to whether defendant is particularly amenable to probation). These decisions have come to be influenced by psychological evaluations, the court's observations of the defendant, recommendations in the presentence investigation, and other broad considerations, rather than the offense-related factors listed in the

guidelines. *See, e.g. State v. Sejnoha,* 512 N.W.2d 597, 600-01 (Minn.App.1994) (affirming downward dispositional departure for sex offender evaluated as amenable to treatment and displaying extreme remorse), *review denied* (Minn. Apr. 21, 1994); *State v. Dokken,* 487 N.W.2d 914, 918 (Minn.App.1992) (stating reversal of downward dispositional departure would be a "weighty and grave matter" for intermediate appellate court, in part because of sentencing judge's opportunity to observe the defendant), *review denied* (Minn. Sept. 30, 1992).

The history of dispositional decisions in Minnesota is somewhat obscured by the fact that appellate review of sentences did not exist in Minnesota before the guidelines. But courts had statutory authority to stay sentences. Minn.Stat. § 609.135, subd. 1 (1978); *see State v. Mertz,* 269 Minn. 312, 315 130 N.W.2d 631, 634 (1964) (stating the trial court had "broad probationary powers" allowing it to stay execution of sentence). And in felony cases, presentence investigations were prepared for the sentencing court detailing the defendant's "individual characteristics, circumstances, needs, potentialities, criminal record and social history" as well as the circumstances of the offense and the harm caused by the offense. Minn.Stat. § 609.115, subd. 1 (1978). The Guidelines Commission's own study showed that pre-guidelines sentencing judges gave "heavy weight" to a defendant's criminal history in determining the appropriate disposition. Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota Sentencing Guidelines* 80 (Butterworth 1988). But there was no authority limiting the court's consideration of other factors.

The relevance of this history to the *Blakely* issue is plain. Dispositional departures based on individual offender characteristics under the guidelines are like the traditional sentencing judgments made by judges in indeterminate sentencing schemes. The validity of those judicial judgments is conceded in *Blakely:*

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

124 S.Ct. at 2540 (alteration in original).

Appellant would argue that he has a "right" to a stayed sentence because that is the presumptive disposition under the guidelines. But that argument is unconvincing. First, the presumptive disposition is determined in large degree by the defendant's criminal history score. As discussed above, that score is not in any way determined by the jury's verdict, despite the apparent assumption to the contrary in *Blakely.* Second, the "right" referred to in *Blakely* must arise from the jury's verdict, and that verdict historically has never determined sentence dispositions, at least since courts acquired the authority to stay sentences. Third, while the elements of the offense found by the jury help determine what is a "typical" offense warranting the presumptive duration, Minnesota courts have not attempted to define what is a "typical" offender to serve as a baseline for the proper disposition of any type of offense. *See State v. Lindsey,* 654 N.W.2d 718, 726

(Minn.App.2002) (holding assault, although brutal, was not more serious than typical first-degree assault).

In practice, because the dispositional decision is largely predictive, Minnesota defendants must convince the court that under the open-ended *Trog* factors, they can succeed on probation, whether or not that is the presumptive disposition. *See generally State v. Hennessy,* 328 N.W.2d 442, 443 (Minn.1983) (affirming dispositional departure where district court was satisfied "that the risk of placing defendant on probation was significantly outweighed" by indications defendant would succeed on probation). At least, defendants must convince the court they are not *particularly* unamenable to treatment in a probationary setting to avoid an upward dispositional departure. *See Chaklos,* 528 N.W.2d at 228 (stating general rule that particular unamenability may be used to support upward dispositional departure).

The traditional role of the jury has never extended to determining which offenders go to prison and which do not. Traditionally, courts and parole officials made "their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation." *Mistretta v. United States,* 488 U.S. 361, 363, 109 S.Ct. 647, 650, 102 L.Ed.2d 714 (1989). The court's power to impose probation, in particular, resulted in an increase in judicial discretion channeled by "careful study of the lives and personalities of convicted offenders," particularly in the form of reports by probation officers. *Williams v. People of State of New York,* 337 U.S. 241, 249, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337 (1949).

The point is not, as the state argues, that these offender characteristics could not be assessed by juries. If

the Sixth Amendment required juries to determine "amenability to probation," that function would have to be assigned to them. But because such decisions are, in essence and in Minnesota practice, the equivalent of indeterminate sentencing, which *Blakely* approves, the Sixth Amendment does not require it.

We note also that dispositional departures were unknown when the Sixth Amendment was ratified. In 1916, the United States Supreme Court held that the federal district court lacked the authority to suspend a criminal sentence indefinitely upon conditions of good behavior. *Ex parte United States,* 242 U.S. 27, 27, 37 S.Ct. 72, 72, 61 L.Ed. 129 (1916). The Court noted that under the common law, temporary reprieves and executive pardons were the only means of escaping the criminal judgment. *Id.* at 43-44, 37 S.Ct. at 74-75. Even as early as 1860, one court expressed the opinion that the court "does not possess the power to suspend sentence indefinitely in any case." *Id.* at 46, 37 S.Ct. at 76 (quoting *People v. Morrisette,* 20 How. Pr. 118 (1860)). Thus, when the Bill of Rights was ratified, the jury's verdict authorized only execution of the prescribed sentence.

This tradition establishes that an offender's amenability or unamenability to probation is not a "fact," within the meaning of *Apprendi,* that increases the offender's penalty. A dispositional departure requiring an offender to go to prison is undoubtedly a greater penalty than probation. *See State v. Carr,* 274 Kan. 442, 53 P.3d 843, 853 (Six, J., dissenting). But an offender's unamenability to probation is a judgment reached after consideration of a series of facts. It is not a "fact necessary to constitute the crime," *Apprendi,* 530 U.S. at 500, 120 S.Ct. at 2368, but rather a strictly offender-related conclusion.

In Minnesota, the district court is required to provide reasons for a dispositional departure as well as a durational departure. *State v. Larkins,* 479 N.W.2d 69, 75 (Minn.App.1991). In Minnesota's indeterminate sentencing scheme before 1980, there was no formal requirement that the court provide reasons for a particular disposition. The sentencing judge, however, received a presentence investigation (PSI) that detailed many of the same factors that govern guidelines dispositional decisions. *See* Minn.Stat. § 609.115, subd. 1 (1978). The parties were entitled to an opportunity to contest any part of the PSI. Minn. R.Crim. P. 27.03, subd. 1 (1978). Although courts were not *formally* required to state a reason for the disposition, the detailed information provided the court and the contested nature of the sentencing hearing would have compelled it in most cases to explain the reason for the decision.

It could be argued that the requirement of departure reasons sufficiently distinguishes dispositional departures under the guidelines from indeterminate sentencing. But, although *Blakely* refers to the "facts supporting [the] finding" of deliberate cruelty that authorized the greater sentence in that case, 124 S.Ct. at 2537, it did not compare the degree of formality of fact-finding under the Washington Sentencing Guidelines with the fact-finding traditionally involved in indeterminate sentencing schemes that *Blakely* approved. We conclude that the determination of amenability or unamenability to probation is not the determinate, structured fact-finding that *Blakely* holds the jury must perform.

The Supreme Court has made a similar distinction with respect to the offender's criminal history, or recidivism, which it has termed "a traditional, if not the most

traditional, basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres v. United States,* 523 U.S. 224, 243, 118 S.Ct. 1219, 1230, 140 L.Ed.2d 350 (1998). The Court stated that, "to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition" in which recidivism went to the punishment only. *Id.* at 244, 118 S.Ct. at 1231. The same could be said with even greater force concerning the offender characteristics that govern dispositional departures, which extend beyond the offender's criminal history score. To hold that the Sixth Amendment requires those personal characteristics to be found by a jury would be an even further departure from tradition than to treat recidivism as an "element." We do not believe that *Blakely* requires this result.

II.

In a supplemental pro se brief, Hanf raises several issues concerning his sentence and its calculation. He argues that the district court's finding of "unamenable to treatment" could represent a reliance on impermissible social and economic factors. *See* Minn. Sent. Guidelines Cmt. II.D.101 (noting that amenability to probation or treatment could be closely related to social or economic factors and courts should demonstrate departure was not based on those impermissible factors). But the district court at sentencing cited Hanf's six prior failures at treatment and his "extreme threat to public safety," not his employment record or community ties or similar factors. The record demonstrates that the dispositional departure was not based on social or economic factors.

Hanf also argues that because he has no prior felony DWI convictions, the district court was required to stay his sentence. But the guidelines provision on "Mandatory Sentences" merely clarifies that for offenders with Hanf's criminal history, "the sentence should be stayed unless the offender has a prior conviction for a felony DWI, in which case the presumptive disposition is [c]ommitment to the Commissioner of Corrections." Minn. Sent. Guidelines II.E. This provision makes execution of sentence mandatory for offenders with a prior felony DWI conviction. It does not bar dispositional departures for offenders without a prior felony DWI.

The other arguments in the pro se brief are not supported by argument or citation to legal authority, or are without any merit, and we need not address them. *See State v. Krosch,* 642 N.W.2d 713, 719 (Minn.2002) (holding that issues not supported by argument or citation to legal authority were deemed waived).

DECISION

The district court's imposition of a dispositional departure based on Hanf's prior driving record and other offender-related characteristics did not violate his Sixth Amendment right to trial by jury.

Affirmed.

Supreme Court, U.S.
FILED
MAR 27 2006
OFFICE OF THE CLERK

(3)

No. 05-1078

In The
Supreme Court of the United States

STATE OF MINNESOTA,

Petitioner,

vs.

JAMES A. ALLEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent does not dispute that this case presents an important question that "will have a direct and significant effect on numerous states, and will have an indirect effect on every legislative body considering sentencing reform."[1] His reasons why this Court should deny this petition are meritless.

I. There Is A Split Of Lower-Court Authority.

Respondent's claim that no split exists seems to be based on lower courts' failure to use the phrase "offender-related."[2] As set out in the petition and amicus brief, however, a number of courts have ruled on the breadth of the *Blakely* rule,[3] with some rejecting the Minnesota Supreme Court's conclusion that a defendant has the right to a jury trial on any fact, other than a prior conviction, that is used to support a departure, even if the fact is not offense-related.[4] Perhaps most notably, the Hawaii Supreme Court held that the Sixth Amendment does not require submission to a jury of "extrinsic" factors that "are separable from the offense itself in that they involve consideration of collateral events or information." *State v. Kaua*, 72 P.3d 473, 483-85 (Haw. 2003). The Ninth Circuit reached the opposite conclusion on habeas review of that same case. *Kaua v. Frank*, 436 F.3d 1057, 1060-62 (9th Cir. 2006).

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[1] Petition for Writ of Certiorari ("Pet.") at 3.

[2] Brief in Opposition ("BIO") at 2.

[3] *Blakely v. Washington*, 542 U.S. 296 (2004).

[4] Pet. 4-5; Amicus Brief ("Amicus") at 10-11.

Further, even if not all but "[m]ost courts that have specifically considered [the offense/offender distinction] have rejected any such distinction," BIO 3 n.5, this is a reason for granting the petition, because these courts have erred in their expansive reading of what the Sixth Amendment requires.

II. An Offense/Offender Distinction Is Consistent With Precedent.

As explained in the petition and amicus brief, an offense/offender distinction is consistent with *Blakely's* underlying principle: that a state cannot avoid submitting "facts of the crime" to a jury by labeling those facts sentencing factors.[5] Pet. 7-12; Amicus 7-10. It is also consistent with the language of the United States Constitution, the traditional understanding of the Sixth Amendment's jury-trial guarantee, and this Court's case law. *Id.*

No decision by this Court has directly addressed the use of offender-related facts to enhance a sentence. Nevertheless, respondent claims that this Court has implicitly held that the Sixth Amendment applies to offender-related facts. His claim is largely based on his assertion that *Apprendi* involved an offender-related fact. BIO 5. Respondent is wrong. Mr. Apprendi received an increase in his sentence because he committed a hate crime, i.e., because his motive for committing the crime was that he did not want an

[5] Contrary to respondent's argument, an offense/offender distinction would not "return the jurisprudence to the 'labeling' rule that the *Apprendi* court rejected." BIO 7. Under *Apprendi* and *Blakely*, the label *a state* places on a fact is irrelevant; this remains true under an offense/offender distinction – a state could not avoid having an offense-related fact submitted to a jury by labeling it an offender-related fact.

African-American family in his neighborhood.[6] This was a fact about the crime. If a different offender had committed the same hate crime, the motive for committing the crime would still have been relevant; it is therefore an offense-related fact under the test set out in the petition. Pet. 13. To put it another way, if Mr. Apprendi had committed a different felony, e.g., sale of a controlled substance, his animosity toward African-Americans would not have been relevant; this is therefore not an offender-related fact, because it does not travel with the offender regardless of the crime committed, as would unamenability to probation or other offender-related facts.

Respondent also argues that an offense/offender distinction is inconsistent with *Ring*. BIO 6. But *Ring* involved a death sentence based on a single aggravating factor: commission of the crime for pecuniary gain. *Ring v. Arizona*, 536 U.S. 584, 596 (2002). This is plainly an offense-related fact. Therefore, in *Ring* this Court was not presented with the question of whether offender-related facts have to be submitted to a jury. *Id.* at 596 n.4 ("Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.")

Respondent's argument illustrates the importance of considering language from an opinion in context. Respondent does not provide any history or policy in support of his argument against an offense/offender distinction, he simply relies on this Court's use of the phrase "any fact." BIO 3-6. But none of the cases respondent cites dealt with offender-related facts; all used the phrase "any fact" as shorthand for "facts of the crime." Pet. 8; Amicus 8-10.

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[6] *Apprendi v. New Jersey*, 530 U.S. 466, 469-71 (2000).

III. Nothing Renders This Case An Inappropriate Vehicle For Addressing The Offense/Offender Distinction.

Respondent makes two arguments that are worth addressing on his claim that this case is an inappropriate vehicle for addressing the offense/offender distinction. First, he contends that the policy concerns with applying *Blakely* to offender-related facts "can be and have been adequately dealt with by the state courts and the state legislature." BIO 7. Respondent does not explain how the practical difficulties set out in the petition can be or have been addressed. The Minnesota legislature has simply authorized the use of sentencing juries to make any findings necessary for departures. This does nothing to address the difficulty in submitting offender-related facts to a jury. Pet. 6-7. If this Court reverses the Minnesota Supreme Court's decision, judges will be able to employ sentencing juries for offense-related facts, but will not have to struggle with the difficulties in doing so for offender-related facts.

Finally, respondent argues that "even if the Court grants the petition, this case will likely be moot before the Court issues an opinion." BIO 8. This is indisputably incorrect. Under respondent's *new* sentence, imposed after the Minnesota Supreme Court reversed his original sentence, his probation is scheduled to expire in October 2006. *Id.* But respondent's original sentence, imposed in October 2003, was 42 months. Appendix to Pet. at 17. This sentence would go back into effect if the Minnesota Supreme Court's decision reversing it was itself reversed by

this Court.[7] At the time he was released following the Minnesota Supreme Court's decision, respondent had served 875 days in prison. Respondent's Appendix 2. Therefore, if this Court reverses the reversal of respondent's sentence, he will still have a substantial portion of his 42-month sentence to serve, not to mention the 5 years of conditional release that his original sentence required after service of his 42-month executed sentence. *Id.* at 6. Clearly, the issue here is not moot.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: March 28, 2006

Respectfully submitted,

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[7] *See, e.g., Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 306-08 (1946); *Fawcett v. McRoberts*, 326 F.3d 491, 494-97 (4th Cir.), *cert. denied*, 540 U.S. 1068 (2003); *Campbell v. United States Parole Commission*, 704 F.2d 106, 109 n.2 (3rd Cir. 1983).